

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

SCOTT KEITH TOEDTMANN

Claimant

VS.

EVERETT JACKSON CONSTRUCTION

Respondent

AND

CONTINENTAL WESTERN INSURANCE COMPANY

Insurance Carrier

Docket No. 1,005,350

ORDER

Respondent and its insurance carrier appealed the December 3, 2002 preliminary hearing Order entered by Administrative Law Judge John D. Clark.

ISSUES

This is the second appeal from a preliminary hearing order entered in this claim for a June 25, 2002 automobile accident. In an October 28, 2002 Order, this Board determined claimant's accident was compensable. In the October 28, 2002 Order, the Board found that claimant had deviated from his employment by driving to his girlfriend's house allegedly to use the restroom but that the deviation had ended once claimant had passed a convenience store located at 47th Street South and Oliver that on previous occasions he had patronized to buy drinks and to use the restroom while on the clock for respondent. Because claimant's accident occurred between the convenience store and claimant's job site, the Board determined claimant had resumed his job duties.

The issue at the first preliminary hearing, which was held on August 27, 2002, was whether claimant's accident arose out of and in the course of employment and, more specifically, whether claimant had deviated from his employment by driving to his girlfriend's house to use the restroom. The record does not indicate that claimant argued to the Judge that he had resumed his job duties by the time the accident occurred. That argument was made for the first time during the appeal to the Board. Consequently, at the first preliminary hearing respondent and its insurance carrier did not present their evidence on that more limited issue.

In the December 3, 2002 preliminary hearing Order, Judge Clark considered respondent and its insurance carrier's arguments but ordered the payment of medical benefits and temporary total disability benefits.

Respondent and its insurance carrier contend Judge Clark erred. They argue respondent's policy was to permit its employees to use the facilities at the nearest convenience store or restroom. Accordingly, they argue that claimant had not resumed his employment activities as the accident did not occur between the job site and the nearest restroom. Respondent and its insurance carrier request the Board to deny claimant's request for benefits.

Conversely, claimant contends the December 3, 2002 Order should be affirmed as respondent neither designated any particular convenience store or restroom that claimant should utilize nor restricted claimant from using the convenience store located at 47th Street South and Oliver for his restroom breaks. Accordingly, claimant argues he had permission to use the convenience store on 47th Street. Claimant also argues that he should be deemed to have resumed his employment activities at the time of the accident as he was unaware that there was another convenience store at 71st Street South and K-15 or that there were other restrooms closer to the job site.

The only issue on this appeal is whether claimant's June 25, 2002 accident arose out of and in the course of employment with respondent.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record compiled to date, the Board finds and concludes:

The December 3, 2002 Order should be affirmed.

At the second preliminary hearing, which was held on December 3, 2002, respondent and its insurance carrier's counsel adroitly established that the Board (more specifically, the undersigned) erred in stating in the Board's October 28, 2002 Order that the convenience store located at 47th Street South and Oliver was the "nearest convenience store where respondent had previously permitted them [claimant and a coworker] to go to buy drinks and use the restroom facilities . . ."¹ The more appropriate adjective in describing the convenience store would have been "nearby."

Respondent and its insurance carrier have now established that there was another convenience store and other restroom facilities closer to the job site where claimant was working on the date of accident. The record indicates the convenience store on 47th

¹ Order (Oct. 28, 2002) at 2.

Street South was 2.8 miles from the job site as compared to 1.8 miles between the job site and the convenience store on 71st Street South. But claimant was unaware of the closer facilities and had used the facilities on 47th Street South.

Moreover, respondent's owner, Mark Jackson, testified that he expected his employees to go to the "quickest convenience store/rest room facility possible."² But he never designated which convenience store or other business his employees were to go to use the restroom nor did he require his employees to measure the distance between potential facilities to determine which was the closest. And Mr. Jackson never advised his employees that they should only go to the 71st Street South convenience store.

The Board concludes that claimant's accident occurred between the job site and a nearby convenience store that claimant had been permitted to use. Accordingly, once claimant passed that convenience store on his way back to the job site his deviation from employment ceased. Consequently, the Board concludes that claimant's June 25, 2002 accident arose out of and in the course of employment.

As provided by the Workers Compensation Act, preliminary hearing findings are not final as they may be modified upon a full hearing of the claim.³

The Board adopts the findings and conclusions set forth in its October 28, 2002 Order that are consistent with the above and which are supported by the present record.

WHEREFORE, the Board affirms the December 3, 2002 preliminary hearing Order entered by Judge Clark.

IT IS SO ORDERED.

Dated this ____ day of April 2003.

BOARD MEMBER

c: Michelle L. Brenwald, Attorney for Claimant
Edward D. Heath, Jr., Attorney for Respondent and its Insurance Carrier
John D. Clark, Administrative Law Judge
Director, Division of Workers Compensation

² P.H. Trans. (Dec. 3, 2002) at 20-21.

³ K.S.A. 44-534a(a).